UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INTEREST RATE SWAPS ANTITRUST LITIGATION **This Document Relates To: ALL CASES**	:	**16 MD 2704 (PAE)**

DEFENDANTS HSBC BANK PLC, HSBC BANK USA, N.A., AND HSBC SECURITIES (USA) INC.'S SUPPLEMENTAL REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE SECOND AMENDED COMPLAINTS

Dated: March 24, 2017

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INTRODUCTION

Plaintiffs' Consolidated Oppositions[1] confirm that the eleventh-hour addition of HSBC to this previously pending action (Class Opp. 94 n.79) was an afterthought, entirely unsupported by the necessary allegations. Class Plaintiffs dedicate three pages (pp. 58-61) of their 107-page Opposition to a discussion of HSBC. In those three pages, Class Plaintiffs (a) rely upon a legal standard that the Second Circuit expressly overruled long ago and (b) rehash the same factual allegations that we previously demonstrated are insufficient under well-settled law.[2]

For their part, the Javelin and Tera Plaintiffs claim to have made "numerous factual allegations detailing each Defendant's involvement in the conspiracy." J&T Opp. 1. But other than identifying Defendants, their Opposition mentions "HSBC" only once: in a sentence defending "group pleading." *Id.* at 20. That sentence contains no specific allegations against HSBC at all.

At the end of the day, Plaintiffs have failed to level plausible allegations that *any* of the Dealer Defendants engaged in wrongdoing. But as for HSBC, they say almost nothing at all. The Complaints should be dismissed as against HSBC.

ARGUMENT

A. Plaintiffs' Approach Against HSBC Relies Upon Authority That Has Been Expressly Overruled By The Second Circuit.

The Complaints assert that the Dealer Defendants collectively owned and dominated a number of industry organizations with influence over the swaps market and that they "used these mechanisms and forums for collusion to conspire in the IRS market." SCAC ¶ 21; *see also* SJTC ¶ 320. As we explained in the opening brief (HSBC Br. 2), the Complaints fail to describe any specific role HSBC played in the alleged conspiracy. The Complaints say only that HSBC: (a) held positions on ISDA and FIA (SCAC ¶¶ 151-53; SJTC ¶¶ 320-23); (b) held a position on OTCDerivNet (SCAC ¶ 177; SJTC ¶ 346); and (c) "gave TeraExchange the runaround" for over a year before finally declining to clear for the platform (SCAC ¶ 230; SJTC ¶ 198).

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[1] Class Plaintiffs' Consolidated Opposition to Defendants' Motions To Dismiss (Feb. 17, 2017) (Dkt. 193) ("Class Opp."); Javelin and TeraExchange Plaintiffs' Consolidated Opposition to Defendants' Motions To Dismiss (Feb. 17, 2017) (Dkt. 194) ("J&T Opp.").

[2] *See* HSBC Defendants' Supplemental Memorandum of Law in Support of Their Motion To Dismiss the Second Amended Complaints (Jan. 20, 2017) (Dkt. 163).

Such thin allegations fall far short of the *Twombly* line. There are no "specifics with respect to the acts of [each] particular defendant" (*In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487, 491 (D. Conn. 2008)), and nothing close to the "specific time, place, or person involved in the alleged conspiracies" (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007)). The Complaints instead "[a]ttribut[e] all actions to the Defendants collectively" rather than "differentiat[ing] among [them]" or "identify[ing]" how each "particular Defendant [is] alleged to have acted." *Two Old Hippies, LLC v. Catch the Bus, LLC*, 784 F. Supp. 2d 1200, 1218 (D.N.M. 2011) (citing *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008)).

Ignoring these settled legal principles, Class Plaintiffs double-down on their lump-them-all-together approach. In their view, "there is no need for a plaintiff to call out [HSBC] by name when referring to all the conspirators collectively" (Class Opp. 61) because, having alleged a conspiracy against the *other* Dealer Defendants, "only slight evidence is needed to link [HSBC] with [the conspiracy]." Class Opp. 58 (quoting *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 257 (2d Cir. 1987)). Thus, they say, it is perfectly alright "to refer to Defendants collectively when they act as a group." *Id*. at 61.

Plaintiffs are fundamentally mistaken about the law. *The Second Circuit has expressly overruled the "slight evidence" standard*, explaining that it "do[es] not accurately describe [a plaintiff's] burden of proof in conspiracy cases" and is no longer "a part of [Second Circuit] case law." *United States v. Huezo*, 546 F.3d 174, 180 n.2 (2d Cir. 2008); *accord, e.g., United States v. Kruse*, 606 F.3d 404, 408 n.1 (7th Cir. 2010) (describing the "slight evidence" rule as a "now-discredited" standard); *United States v. Lopez*, 443 F.3d 1026, 1030 (8th Cir. 2006) (en banc) (expressly "reject[ing]" the "so-called slight evidence rule"); *United States v. Toler*, 144 F.3d 1423, 1427 (11th Cir. 1998) ("banish[ing]" the "'slight evidence' rule"). Plaintiffs' reliance upon overruled authority to defend the adequacy of generalized allegations speaks volumes about their pleading failures against HSBC.

In any event, the slight-evidence rule is a rule about evidence, not allegations. As for allegations, group-based pleading—allegations that "attribut[e] all actions to the Defendants collectively" and "fail[] to identify, within each count, [which] particular Defendant[s] [are] alleged to have acted" in which particular ways—necessarily "fail[s] to provide fair notice under rule 8" to each defendant in its own right. *Two Old Hippies*, 784 F. Supp. 2d at 1218; *see In re Elevator Antitrust Litig.*, 2006 WL 1470994, at *2 (S.D.N.Y. 2006), *aff'd*, 502 F.3d 47 (2d Cir. 2007) (rejecting "allegations of wrongdoing [that] are made against all defendants without any differentiation"). Class Plaintiffs openly admit that this is *exactly* what they have done. They say "it is reasonable to refer to Defendants collectively" (Class Opp. 61), with nothing about HSBC individually. But the law does not allow this. That should end this lawsuit against HSBC.[3]

B. HSBC's Mere Membership In Several Financial Industry Trade Organizations (But Not In Others) Falls Far Short Of Plaintiffs' Pleading Burden.

Class Plaintiffs also purport to have uncovered an "avalanche of facts" showing a conspiracy (Class Opp. 24), revealing the "time, place, and attendees at conspiratorial meetings" (*id.* at 56) as well as "what each of [the Dealer Defendants] did over the course of the entire conspiracy" (*id.* at 57). The Javelin Plaintiffs proclaim that their Complaint is "replete with allegations of conduct by specific Dealer Defendants." *See* J&T Opp. 21. As to HSBC, those are completely hollow invocations.

[3] Class Plaintiffs say that our authorities are distinguishable because the complaints in those cases "made conclusory allegations without any specific facts." Class Opp. 61 n.46. That is precisely our point, both there and here: the Complaints here offer naked conclusions devoid of factual development. Plaintiffs go further, lumping together the three "HSBC" defendants without drawing any distinction among them. SCAC ¶ 56 (collectively defining "HSBC" to mean the individual defendants "HSBC Bank PLC, HSBC Bank USA, N.A., HSBC Securities (USA) Inc., and their subsidiaries and affiliates that entered into IRS contracts with the Class"); SJTC ¶ 49 (collectively defining "HSBC" to mean the individual defendants "HSBC Bank PLC, HSBC Bank USA, N.A., HSBC Securities (USA) Inc., and their subsidiaries and affiliates that participated in the IRS market"). Merely lumping "HSBC" in with the other Dealer Defendants is insufficient to overcome these shortcomings.

For example, our opening brief explained (at 4) that "merely pleading that multiple entities hold positions on a board of directors does not establish a horizontal agreement for purposes of Section 1." *Sky Angel v. Nat'l Cable Satellite Corp.*, 947 F. Supp. 2d 88, 102 (D.D.C. 2013). Plaintiffs rejoin that they have alleged "more than membership" in OTCDerivNet because their complaint "alleges HSBC installed its head of IRS trading on a board used as a vehicle of the conspiracy, alongside key architects of the conspiracy." Class Opp. 59. But that's just a long-winded way of saying *membership*. Without actually citing to the Complaints, Class Plaintiffs claim that they have alleged that "board memberships *were actually used* to have illicit conversations." *Id.* That is not true. Neither their Complaint nor the Javelin Complaint says a word about any board-member conversations—*when* such conversations took place, *where* they took place, *what* was discussed, or *who* was involved—let alone that any such conversation involved a representative of HSBC. *See* SCAC ¶¶ 176-88; SJTC ¶¶ 345-56.

Plaintiffs are thus left insisting that "HSBC's decision to join OTCDerivNet is itself probative" because "the principal purpose of OTCDerivNet was to allow the Dealer Defendants to secure control of SwapClear." Class Opp. 59. But that, too, is bluster. According to the Complaints, the Dealer Defendants supposedly used OTCDerivNet to take control of SwapClear *nearly a decade before* HSBC allegedly joined OTCDerivNet in 2009. SCAC ¶¶ 176-80; SJTC ¶¶ 345-49. Similarly, although Plaintiffs allege that the Dealers orchestrated a boycott of the CME's never-launched Swapstream product through OTCDerivNet, those allegations likewise pre-date HSBC's alleged joinder of OTCDerivNet. SCAC ¶¶ 181-88; SJTC ¶¶ 350-56. Ambiguously lumping Defendants together into a single amalgam, Class Plaintiffs conclude nevertheless that "HSBC is implicated by all of these allegations." Class Opp. 60. It is not enough simply to say so; Plaintiffs do not allege that HSBC did anything specific as part of OTCDerivNet in furtherance of any conspiracy.

The shortcomings with respect to HSBC do not end there. Class Plaintiffs admit that "HSBC was *not* part of Project Fusion" (Class Opp. 58) (emphasis added), which they describe as "the plan that brought [the Dealer Defendants] together as a cartel." *Id.* at 3. Because HSBC was not part of

Project Fusion, it could not have played a role in the supposed scheme to co-opt Tradeweb, the alleged "principal forum" through which the Dealer Defendants conspired (SCAC ¶ 151; *see also* SJTC ¶ 23). Plaintiffs further claim that the Dealer Defendants coordinated through "secretive 'strategic investment' groups" (Class Opp. 2), but HSBC is never alleged to have done so. These factual holes are more than enough to dismiss HSBC.

Finally, Class Plaintiffs offer up a list of generic allegations supposedly about HSBC (Class Opp. 60), all of which are backed by Complaint citations *that do not mention HSBC*:

- HSBC "conspired to punish IDBs." But the Complaint never mentions HSBC as a participant in the alleged "heated phone calls." SCAC ¶ 162; SJTC ¶ 260.
- HSBC boycotted investors that attempted to trade on IDBs. But the Complaint again never mentions HSBC in this regard. SCAC ¶¶ 163-64; SJTC ¶ 333.
- HSBC provided liquidity to ICAP and preferred platforms with name give-up. But the Complaint doesn't identify *any* of the Dealer Defendants by name with respect to either of these allegations. SCAC ¶¶ 166-73; SJTC ¶¶ 335-42; SCAC ¶¶ 303-07; SJTC ¶¶ 253-57.
- HSBC boycotted Javelin, TeraExchange, and TrueEx. But as we explained in the opening brief (at 7-8), the Complaints do not allege any specific facts suggesting that HSBC did anything unlawful with respect to those platforms, which in any event presented a number of potential economic pitfalls to any dealer that decided to use them.

As with the rest of Plaintiffs' allegations against HSBC, there simply "is no there there." Gertrude Stein, EVERYBODY'S AUTOBIOGRAPHY 298 (1937).

CONCLUSION

Plaintiffs argue that it is okay "to refer to Defendants collectively" and not individually, "which is what the Complaint does here" with respect to HSBC. Class Opp. 61. Plaintiffs are wrong, both on the facts they plead and the expressly overruled law they cite. Rule 8 demands more than what appears in the third version of each Complaint. The Complaints should be dismissed with prejudice as against HSBC Bank PLC, HSBC Bank USA, N.A., and HSBC Securities (USA) Inc.

Dated: March 24, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 24, 2017, I filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter.

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